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No. 1262

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

ARTHUR WILCOX, LESLIE GRIER, GEORGE PORTER, ABE SMITH, RUSSELL WATERS and OTIS DRUMMOND,
Petitioners,

v.

TRANSAMERICAN FREIGHT LINES, INC.,
Respondent.

BRIEF OF RESPONDENT

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TRANSAMERICAN FREIGHT LINES, INC.,
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BRIEF OF RESPONDENT

QUESTION PRESENTED

Is this case one in which a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled cause?

STATEMENT OF THE CASE

This matter was the subject of a Motion for Summary Judgment which was granted by the District Court pursuant to Rule 56, Federal Rules of Civil Procedure. The factual premises upon which the District Court and the Court of Appeals acted are set forth in the opinions of those Courts. The record in this case is extensive and includes a voluminous deposition of the co-defendant, Harry Culyer, as well as numerous affidavits and records, all of which are not before this Court. In determining that the Respondent was entitled to a judgment as a matter of law,

because there was no genuine issue as to any material fact, it is clear from their opinions that both the District Court and the Court of Appeals considered the record carefully. It appears inappropriate at this time to burden this Court with selected excerpts taken out of context from the record. Since, however, the Petitioners have itemized certain facts in their Petition, it may be necessary for the purposes of this brief and in order to support the authority to be cited to present some facts in addition to those set forth in the opinions of the lower courts. These facts are:

1. Culyer occupied a dual relationship with Respondent, being both a lessor of equipment and also a driver of equipment.
2. Compensation for lease of the equipment was computed and paid separately and apart from any compensation paid as an employee.
3. Culyer was only paid as an employee when he was dispatched by or under instructions from Respondent and when the movement of his unit was on Respondent's business.
4. All costs and expenses related to the operation of the equipment leased by Culyer were his responsibility as lessor and this responsibility included the obligation to "at all times keep . . . equipment in good mechanical condition, order and repair." Culyer's uniform was purchased and decorated by him and "Transamerican had nothing to do with the uniform."
5. Culyer maintained a log indicating his time "on duty" and his time "off duty", the status of "off duty" occurring when he was outside of the direction and supervision of Respondent.
6. At the time of the accident, Culyer was carrying himself as "off duty."

7. Culyer was responsible for getting himself to work getting himself home from work.
8. Culyer provided the basic license for the unit leased to Respondent.
9. Culyer, on the date of the accident, was not instructed to take his equipment home, did not ask anyone to take his equipment home, was not directed to go to the Cincinnati Terminal, was not required to keep his automobile at the Cincinnati Terminal, and he could travel any road he wanted on the way to Cincinnati.
10. The trip involved was not in interstate commerce.

ARGUMENT

The first contention made by Petitioners is that they were deprived of a trial by jury. To the contrary, the cases have held that, since Rule 56 may properly be invoked only where there is no fact issue to be tried, the use of the Rule does not violate the constitutional guaranty of trial by jury of fact issues. *Lindsey* v. *Leavy,* 149 F.2d 899 (9 Cir. 1945), Cert. den. 66 S. Ct. 331, 326 U.S. 783, 90 L. Ed. 474; *Page* v. *Work,* 290 F.2d 323, 334 (9 Cir. 1961), Cert. den. 82 S. Ct. 121, 368 U.S. 875, 7 L. Ed. 2d 76.

With respect to the balance of the Petition which is addressed to the so-called subsidiary questions, there is one basic legal principle which supports the decisions of the lower courts in this case. This principle has been accepted and reiterated in almost every decision, federal and state, touching upon the subject of this controversy. In considering similar factual situations involving the claim that the lessee-motor carrier was vicariously responsible for the acts of its lessor-driver, the principle established by the decisions is:

It is the actual relationship between the operator of the equipment and the lessee thereof at the time of the accident which determines the responsibility or lack thereof of the lessee-motor carrier for the negligence of the operator.

The above proposition results from the Ohio case of *Simon* v. *McCullough Transfer Co.,* 155 O.S. 104, 98 N.E. 2d 19 (1951), a "trip lease" case. If the "trip lease" factor was distinguishing, that stigma was removed when Justice Stewart, while sitting on the Sixth Circuit, wrote the opinion in the case of *Kaplan Trucking Company* v. *Lavine,* 253 F. (2) 254 (6 Cir. 1958), a situation arising under the same regulations applicable in this case. In the *Kaplan* case Judge Stewart stated:

> "It is the actual relationship of the parties at the time of the collision that is controlling." (ibid 257)

The necessity that there be some positive relationship between the lessee-driver and the lessor-carrier is also emphasized in the Ohio decision of *Thornberry* v. *Oyler,* 164 O.S. 395, 131 N.E.2d 383 (1955) wherein, in its first syllabus the Court stated that the carrier was only responsible "for the actions and conduct of the driver within the scope of the carrier's business." (131 N.E.2d 383)

The I.C.C. regulations themselves give clear indication of the circumstances under which they are applicable to any arrangement created thereunder. In Sec. 207.2 (b) of the Regulations the word "Equipment" is limited, by definition, to vehicles "used by authorized carriers *in the transportation of property for hire.*" (App. C. 11a). (emphasis supplied.) Thereafter, the regulations specifying the conditions upon which the Petitioners rely, apply said conditions only to "authorized transportation in or with equipment." (ibid 13a) In this case, there was no

transportation of property for hire, nor was there any transportation in or with equipment and no facts suggesting either to justify the invocation of the regulations, even if they mean what Petitioners contend they mean. Therefore, on the basis of the regulations themselves, Petitioners' arguments should fail.

The most recent and analagous case on the subject of carrier responsibility for acts of an off duty lessor is *Gackstetter* v. *Dart Transfer Co.*, 130 N.W.2d 326 (Minn. 1964). The hypothesis urged by the litigant attempting to hold the carrier in that case is the same as is forwarded in this Petition, and was stated by the Minnesota Court to be "an assertion that the effect of these regulations and the lease is to impose for the period of the lease an absolute liability" upon the carrier for the negligence of the lessor. (ibid 329, 330). In answering that hypothesis, the Court stated that: "The effect of the rules and the lease is to make the owner-driver an employee of the lessee." (ibid 329) In support of this conclusion the Court cited not only the *Kaplan Trucking Company* and *Simon* v. *McCullough Transfer Co.* cases cited heretofore, but also the cases upon which Petitioners rely on page 12 of the Petition.

The trial court, in this case, in reaching his decision cited exactly the same cases and, in addition, included the *Gackstetter* decision in restating the principle that the authorities "unequivocally establish that liability has not been imposed on an absolute basis, but rather has been based on whether, at the time of the accident, the owner-operator-lessor was in the scope of his employment for his carrier's business." (App. A, 5A). This determination is, of course, consistent both with the cases cited and the regulations and requires the conclusion that whatever else a lease arrangement between an owner-lessor and a lessee-carrier may imply, it does not create a relationship whereby

every use of the leased vehicle or every activity of the lessor-driver is or becomes the use or the activity of the lessee.

Perhaps most of the cases cited in the Petition resulted in findings similar to those for which these Petitioners originally had aspirations. In each of these cases, however, there were genuine factual issues which had to be developed and determined by a jury. An example is the situation in the *Kaplan Trucking Company* case, where the Court indicated clearly that there was a factual issue whether or not the lessor-driver was on the business of the carrier at the time of the accident. Both of the lower courts in this case, however, applying the standards and criteria required in the face of a Motion for Summary Judgment, found there was no factual issue. In so doing, the Court did not decide any facts but merely applied the facts in the record to the law which looks to the actual relationship of the parties at the time of the collision.

No specific argument in support of the statement that there is a conflict between decisions of the Third Circuit and the Sixth Circuit is made in the Petition, although such a conflict is designated as a reason for granting the Writ of Certiorari. Comparison of the case of *Mellon National Bank & Trust Co.* v. *Sophie Lines, Inc.*, 289 F. (2) 473 (3 Cir. 1961) with this case will show clearly the consistency and compatability between the two cases. In the *Mellon* decision, an actual interstate movement requiring a franchise was being conducted under the ostensible authority of the carrier in a unit then under lease to it by a driver employed by it. In addition, the Court found a definite benefit to the carrier in conserving certain expenses it would have otherwise had. None of these facts exist in this case. To the contrary, the movement by Culyer was not in interstate commerce, was not upon the business of the Respondent, but was for Culyer's own

personal benefit and in the interest of his business operation as a lessor of motor equipment. As a result reasonable minds could not reasonably differ concerning the absence of responsibility of the Respondent for Culyer's activity.

While neither of the lower courts touched upon the admittedly intrastate character of the particular movement in this case, of interest on this subject is the case of *Schmidbauer* v. *Baltimore & Pittsburgh Motor Express Co.*, 181 A.2d 325 (Md. 1962). In that case the Court, referring to ICC regulations, held that:

> ". . . Section 207.4 does not impose liability on the franchise carrier between interstate movements, when the non-owned equipment is being utilized in an activity that is entirely disassociated with interstate or foreign commerce, such as the activity of the tractor involved in the present case as shown by the undisputed facts." (ibid 330)

Further, the decision stated:

> "The fact that appellee's name and ICC permit number were displayed on the tractor and the fact that a copy of the lease was in the cab, are immaterial to the case at bar. None of these was needed . . . to carry on the movement in which the operator was engaged when the collision occurred." (ibid 330)

In this case, no authority conferred on Respondent was required to permit the movement of Culyer in a truck owned by him, both literally and as hereafter developed by specific ICC definition, on a license provided to him on a route chosen by him. It is submitted that on the rationale of the *Schmidbauer* case alone, the decision of the lower courts in this case is proper.

In criticizing the decision made by the Court of Appeals, Petitioners have derided the Court's comment concerning the concept of ownership, its responsibilities and

privileges. This criticism, however, again ignores the specific provisions of the ICC regulations which, in Sec. 207.2 (f), (1) and (3) thereunder, make Culyer an "owner" and, simultaneously, in (2) thereof also conceives ownership in the Respondent. (App. C, 11a). The Ohio law, of course, is clear and unequivocal that the assessment of responsibility to an owner of a motor vehicle must be governed by the principle of respondent superior. *White Oak Coal Co.* v. *Rivoux*, 88 O.S. 18 (1913); *Senn* v. *Lackner*, 157 O.S. 206, 105 N.E.2d 49 (1952).

The public policy argument made by Petitioners in reliance on *Hodges* v. *Johnson*, 52 F. Supp. 488 (D.C. W. Va. 1943) has already been answered by the Ohio Supreme Court. In the *Simon* v. *McCullough Transfer* (*supra*) opinion, Judge Stewart stated pointedly in referring to the view in the *Hodges* case: "With due respect we are constrained to disagree." (98 N.E.2d 24):

The arguments and authorities set forth in the Petition develop neither a great question of public importance, nor do they demonstrate a real conflict between the decisions of Circuit Courts, nor do they establish any of the reasons, either literal or within the sense of Supreme Court Rule 19 to justify the grant of a Writ of Certiorari. The only real question which was involved in the original proceeding from which this Petition has come was whether, on the facts presented, there was any genuine issue. Both of the lower courts analyzed the facts carefully and the Petitioners had a generous opportunity to present evidence and to set forth in brief and on oral argument where and to what extent there was an issue of fact. In essence, Petitioners are now coming before this Court to request it to review the evidence which revealed without question as the Court of Appeals said: "In driving his tractor on the way home after completion of his work and while off duty, he (Culyer) was not engaged in his employer's business, nor was he

doing anything for the benefit of his employer." (App. B., 9a). Justice Holmes has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Jonston*, 268 U.S. 220, 227 (1924). To the same effect is *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1937).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By .....

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